No. 22631

IN THE

United States Court of Appeals
For the Ninth Circuit

PETER F. COMSTOCK; ANN FETTER; SUE D. GOTTFRIED;
IRWIN R. HOGENAUER and SELMA WALDMAN,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

REPLY BRIEF OF APPELLANTS

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ARGUMENT IN REPLY

I. The Federal Court Should Determine the Constitutionality of R.C.W. 9.27.060(2) Despite the Absence of a State Court Construction

Appellee raises only one point in defense of the court's denial of appellants' motion to dismiss on the grounds of the unconstitutionality of R.C.W. 9.27.060(2), i.e., that in the absence of a state court construction of the stat-

ute, one must assume a constitutional interpretation.

There are several cogent reasons why appellee's argument is untenable.

First, appellee has ignored the fact that we are concerned with a Federal statute, not a State statute. Under the terms of 18 U.S.C.A. §13, the Federal Government specifically adopts portions of the State Criminal Code and makes them applicable to various areas of Federal control as defined in 18 U.S.C.A. §7. These portions of the State Criminal Code then become Federal law. As such, construction of these laws is controlled by Federal decisions rather than State decisions. A case in point is *McCoy v. Penco,* 145 F.2d 260 (1944, 8th Cir.). There the defendant who had been charged under the predecessor to 18 U.S.C.A. §13 contended on appeal that the indictments were defective under Texas decisions construing the particular State statute. The court stated at page 262:

> "The Texas decisions are not controlling. Prosecutions under 18 U.S.C.A. §468 are not to enforce the laws of the state, territory or district, but to enforce federal law, the details of which instead of being recited, are adopted by reference." *People of Puerto Rico v. Shell Co.,* 302 253, 266; 58 S.Ct. 167, 173; 82 L.Ed. 235.

A similar contention was raised by the defendant in the more recent case of *Smayda v. United States,* 352 F.2d 251, 253 (1965). In response, the court stated:

> "The Assimilative Crimes Act creates a federal offense, it refers to the California statutes for its definition and penalty; but it does not incorporate the whole criminal and constitutional law of California."

In the face of this language, appellee's suggestion that the Federal court has no warrant to assume the Washington Supreme Court would hold the statute unconstitutional, is clearly untenable. The Federal court has a Federal statute before it and must concern itself with its constitutionality.

Any court construing this statute must conclude that it prevents the exercise of constitutionally protected rights. On page 13 of appellants' opening brief were set out various protected activities which could be prohibited by this statute. Appellee never met appellants' contention and instead chose to quibble on the definition of the term "breach of the peace."

While appellee was correct in stating the Washington court in *Smith v. Drew,* 175 Wash. 11, 20 P.2d 1040 (1933), had no constitutional question before it when they defined breach of the peace, it is equally as correct to state that the definition they arrived at is the same reached by all of the state courts involved in the decisions cited in appellants' opening brief. There is no reason to assume breach of the peace has any other meaning.

R.C.W. 9.27.060(2) purports to measure a violation by the temper of the particular community. The danger of this type of statute is aptly characterized by Mr. Justice Black in his concurring opinion in *Cox v. Louisiana,* 379 U.S. 536, 13 L. Ed.2d 471, 85 S. Ct. 453 (1965). After stating the Louisiana statute was invalid because it was not sufficiently narrowly drawn to assure non-discriminatory application, he stated at page 579:

> "In the case before us Louisiana has by a broad, vague statute given policemen an unlimited power to

> order people off the streets, not to enforce a specific, non-discriminatory state statute forbidding patrolling and picketing, but rather whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment to moment opinions of a policeman on his beat." (Cite omitted.)
>
> "This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree."

Even granting appellees' contention that there is a rule of law that Federal courts should assume that the Washington court will not give a statute an unconstitutional interpretation, such rule is not applicable when the statute involves itself with First Amendment freedoms.

This very problem was dealt with by the Second Circuit in *Wolff v. Selective Service Local Board No. 16,* 372 F.2d 817 (1967), a case involving the reclassification of individuals who had engaged in various protests concerning the Selective Service system. The court stated at page 824:

> "Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation, but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed."

It is interesting to note that this decision comes from the same circuit as *United States v. Jones,* 365 F.2d 675 (1966), a case heavily relied upon by appellee.

Another cogent comment upon this problem was made by the Supreme Court in connection with the so-called "abstention" doctrine in *Baggett v. Bullitt,* 377 U.S. 360, 375, 12 L. Ed.2d 377, 84 S. Ct. 1316 (1964). Here the court stated in response to respondents' argument that the court should await a constitutional determination by the state courts:

> "We are not persuaded. The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity power."

The court then went on to list the considerations which militated against the application of that doctrine. Included among them were that the particular statute was open to an indefinite number of interpretations, that the constitutional issue is not subject to resolution in one litigation, and that the resultant piecemeal adjudication inhibits the exercise of First Amendment freedoms for an undue length of time. All of these considerations are present in the instant case.

A State court determination on the instant facts might lead to a determination that the appellants were not asserting constitutional rights. It would not reach the question of whether the myriad of borderline activities were or were not to be included in this statute's prohibitions. As the Supreme Court stated at page 378 in *Baggett v. Bullitt, supra*:

> "It is fictional to believe that anything less than extensive adjudications, under the impact of a variety of factual situations, would bring the oath within the bounds of permissible constitutional certainty. Abstention does not require this."

The free exercise of First Amendment rights is too vital to await the long and arduous procedure of obtaining a construction of this statute through numerous State Supreme Court decisions.

Appellee has asked this court to refrain from making a constitutional determination. It is clear that under the criteria set out in the *Wolff* and *Baggett* cases, *supra,* in the instant case it would result in a severe curtailment of the expression of First Amendment freedoms. The burden on the Government to enact well-defined, narrow statutes is slight when compared to danger of the infringement of Constitutional rights.

II. No Evidence of Assembly as to Appellants Hogenauer and Gottfried

To indicate evidence supporting the conviction of Appellant Hogenauer, the Government quotes at length (and out of full context) Inspector LaPointe's testimony as to the gathering and seating of some unnamed people across the entrance to the Selective Service office. As to this, it is sufficient to quote the court's comment regarding this testimony (Tr. 71):

> "MR. DARRAH: . . . Inspector LaPointe testified that Hogenauer—
>
> "THE COURT: I am not going to consider the inspector's testimony at all as to Mr. Hogenauer."

This was because the inspector, when asked to identify Mr. Hogenauer in the courtroom, had pointed out an unrelated onlooker and had been totally unable to identify Mr. Hogenauer (Tr. 36-37). Thus, the Government can

hardly rely on LaPointe's testimony to support the conviction.

However, even if we were to accept the inspector's partially quoted testimony as true, he gave not a scintilla of evidence that Mr. Hogenauer assembled with two or more other persons in a manner to disturb the peace.

Similarly, the testimony relied on by appellee to convict Appellant Gottfried made no mention of assemblage with two or more other persons. It merely described her arrest. The fact that both of these appellants were arrested is not evidence that they assembled with two or more persons in a manner to disturb the peace.

CONCLUSION

The Federal court has a duty to determine the constitutionality of R.C.W. 9.27.060(2) which became Federal law by virtue of the Government's use of the Assimilative Crimes Statute, 18 U.S.C.A. §§7, 13.

In any event, the inhibitory effect of this statute on the expression of First Amendment rights directs the Federal court to examine its constitutionality.

The testimony quoted by appellee to justify the convictions of Appellants Hogenauer and Gottfried demonstrated no evidence of an assemblage with two or more persons in a manner calculated to disturb the public peace.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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